Merger Enforcement in a World of Multiple Arbiters

Prepared Remarks of

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Merger Enforcement in a World of Multiple Arbiters

Some significant differences exist between the approaches of the United States and the European Community in the enforcement of their antitrust laws. We should, however, keep the impact of those differences in perspective. They are too great to ignore, but not so great as to jeopardize either most trans-Atlantic business activity or trans-Atlantic antitrust enforcement cooperation. I hope that further cooperation will lead to a greater understanding of our points of divergence, and that an open discussion of these differences will enable us to continue our decade-long trend of convergence in merger enforcement policy.

Atlantic business might be simpler if, for example, electrical appliances used the same power and plugs, the U.S. and Europe used the same cellular telephone technology, or there were one standard of measurement, rather than both metric and English.

Similarly, U.S. and European antitrust policies share many fundamental precepts and goals, but also differ in some significant respects. That is why, ten years ago, the European Community and the United States entered into an antitrust cooperation agreement, a major purpose of which is "to lessen the possibility or impact of the differences between [us] in the application of [our] competition laws."[2]

1. Types of Differences

It is important to understand that there are different kinds of differences. One difference is in the scope of business activity covered by U.S. and EU antitrust laws. For example, some exclusive agreements, such as those that grant exclusive territorial rights, may be unlawful in Europe because of the EU's market integration imperative, but would be permissible in the United States. Another difference can be found in varying theories of harm underlying U.S. and EC enforcement decisions. One notable example arises in the area of conglomerate effects, or bundling, or portfolio power, about which I will say more later. In addition, the effects of trans-Atlantic business activity may differ significantly on each side of the ocean. For example, in a merger case, one party may be active on only one side of the Atlantic, or the markets in Europe and the United States may differ for other reasons, such as government regulation (including tariffs), transportation costs, or the nature of the product.

Finally, as I have said elsewhere,[3] antitrust enforcement is highly fact-intensive. Even where there is agreement on theories of harm and the laws of both jurisdictions cover the activity, the enforcers might disagree on the interpretation of the evidence. This kind of difference arises not only in the international context; even after over one hundred years of federal antitrust enforcement, differences arise among United States antitrust enforcers:

- The Federal Trade Commission, for example, has five commissioners who decide collectively whether enforcement action is warranted in any given case. Split decisions at the FTC – like those that occurred most recently in the *PepsiCola*[4]

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[2] *Agreement between the European Communities and the Government of the United States of America Regarding the Application of Their Competition Laws*, Sept. 23, 1991, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504, and OJ L 95/45 (27 Apr. 1995), *corrected at* OJ L 131/38 (15 June 1995), *available at* <http://www.usDOJ.gov/atr/public/international/docs/ec.htm>.

[3] Timothy J. Muris, *Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity*, before the Antitrust Section Annual Meeting (Chicago, IL, Aug. 7, 2001), *available at* <http://www.ftc.gov/speeches/muris/murisaba.htm>.

[4] *Pepsi Inc./Quaker Oats Company*, FTC File No. 011-0059, FTC press release dated Aug. 1, 2001, *available at* <http://www.ftc.gov/opa/2001/08/pepsi.htm>.

[5] *General Mills, Inc./Diageo plc/Pillsbury Co.*, FTC File No. 001-0213, FTC press release dated Oct. 23, 2001, *available at*

[11] Similarly, approximately 25 percent of Hart-Scott-Rodino filings involve at least one foreign firm, a figure that has remained relatively constant through the 1990s.

[12] *WorldCom/Sprint*, Case No COMP/M.1741, European Commission Decision

First, I do not believe that the EC discriminates against U.S. firms. Statistically, it has cleared the vast majority of mergers involving U.S. firms. At the same time, the EC has blocked, or required substantial undertakings in, a significant number of deals involving only European firms, including, in just the past few years, *Volvo/Scania*,[16] *AirTours/First Choice*,[17] *Vodafone/Mannesmann*,[18] and *Tetra Laval/Sidel*.[19]

Second, I do not believe that the EC distorts its competition enforcement decisions to achieve industrial policy objectives. The EC's 1991 *deHavilland*[20] decision signaled that it would not interpret the Merger Control Regulation to permit the creation of "European champions." The EC's overall enforcement record is consistent with the precedent set in *deHavilland*.[21]

Third, I do not believe that significant differences between the EC and U.S. authorities in enforcement outcomes – as in *Boeing/McDonnell Douglas* and *GE/Honeywell* – are necessarily

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[16] *Volvo/Scania*, Case No COMP/M.1672, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1672_en.pdf>.

[17] *AirTours/First Choice*, Case No IV/M.1524, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1524_en.pdf>.

[18] *Vodafone Airtouch/Mannesmann*, Case No COMP/M.1795, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1795_en.pdf>.

[19] *Tetra Laval/Sidel*, Case No COMP/M.2416, European Commission Decision (public version not yet available).

[20] *Aerospatiale-Alenia/deHavilland* (Decision 91/619/EEC), 2 Oct. 1991, OJ 1991 L334/42, *reprinted in* [1992] 1 CEC (CCH) 2,034. In this case, the EC blocked a proposed merger in the world market for 20-70 seat turboprop commuter aircraft that would have given the combined firm 76 percent of the market for 60-70 seat aircraft and 64 percent of the market for 40-59 seat aircraft. In the immediate wake of the decision, the French Transport Minister said, "This [decision] goes against the interests of the European aerospace industry and risks weakening it dangerously against world competition." *See* A. Hill and P. Betts, *Year-Old Watchdog Bares its Fangs*, FINANCIAL TIMES, Oct. 4, 1991, p. 19.

[21] *See* Valentine Korah, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND POLICY (7th ed. 2000) 310 at n. 22.

[22] In the United States, Section 7 of the Clayton Act prohibits acquisitions the effect of which "may be substantially to lessen competition or to tend to create a monopoly" in any line of commerce or in any section of the country. Clayton Act § 7, 15 U.S.C. § 18 (1998 supp.). In the European Union, the Merger Regulation prohibits concentrations that create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. Council Regulation (EEC) No 4064/89 of 21 December 1989, OJ L 395 (30 Dec. 1989); corrected version OJ L 257 (21 Sept. 1990); as last amended by Council Regulation (EC) No 1310/97 of 30 June 1997, OJ L 180 (9 July 1997); corrected version OJ L 40/17 (13 Feb. 1998).

[23] *The Boeing Co.*, *supra*, n. 13.

[24] *Boeing/McDonnell Douglas*, OJ L 336/16 (8 Dec. 1997), [1998] CEC 2,069.

[25] William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 ANTITRUST L.J. 805, 831 (2001).

[26] There are other important issues, such as how bidding markets are evaluated.

[27] *See, e.g.*, LEXECON, The Economics of GE/Honeywell – Part 1: Mixed Bundling, Aug. 31, 2001.

Second, prohibiting a merger based on a mixed bundling theory assumes the ability to predict with a high degree of confidence that if the conduct were to occur, rivals could not respond effectively and eventually would be driven from the market. Such predictions should be based

[28] Submission of the United States Department of Justice to the Organization for Economic Cooperation and Development Roundtable on Portfolio Effects in Conglomerate Mergers ¶ 60 (Oct. 15, 2001), *available at* <http://www.usDOJ.gov/atr/public/international/9550.htm>.

[29] This concern is reminiscent of the EC's concern in *Boeing/McDonnell Douglas* that exclusive purchase contracts with certain buyers accounting for eleven percent of the market presented a much greater threat of foreclosure than their market share alone would indicate.

products.

As with mixed bundling, prohibiting a merger based on predictions of vertical foreclosure when the merged firm will have only a small purchasing market share should require a high degree of confidence and hence of proof. It is important to consider the likely adaptive responses of other market participants. The EC's opinion appears skeptical of the adaptive powers of substantial industry players, and leaves observers to question why, if the market worked as the decision posits, engine manufacturers would continue to make substantial expenditures in competing for sole-source engine opportunities.

Finally, the U.S. and EC approaches raise issues of *ex ante* versus *ex post* control of potential anticompetitive practices. Even if the merged firm ultimately were to engage in the practices that the EC fears, it is not clear why these practices could not be challenged under the EC's powers to prohibit anticompetitive agreements and abuse of dominance (recognizing that the EC apparently does not have the statutory powers that exist in the U.S. to undo mergers or to order break-ups of dominant firms). In the U.S., given the likelihood of at least short-term benefits that the merger would have produced, the DOJ concluded that it made more sense to approve it, knowing that it could challenge unlawful conduct later if it were to occur. In short, the DOJ did not want to sacrifice likely and perhaps substantial benefits for longer-term, more speculative harms.

The differences in this case do not appear to be attributable to a failure of cooperation; I understand that the DOJ and the EC worked closely together throughout the investigation. Nor do the differences appear to be traceable primarily to a difference in interpreting the available evidence, which, as I said earlier, is one of the sources of recent split votes at the FTC. Rather, it appears that the EC is more inclined than the U.S. authorities to give credence to concern over potential long-term harm that could arise from range effects of a merger.

Before discussing the implications for business of confronting different antitrust enforcement policies, let me reiterate my belief that, given the breadth of EC and U.S. enforcement responsibility, the scope of our differences is relatively small. We certainly cannot ignore these differences, but, based on our experience, they do not jeopardize the EC-U.S. antitrust enforcement relationship or the ability of business to obtain compatible competition examinations by EC and U.S. authorities in the vast majority of cases.

II. IMPLICATIONS OF OUR DIFFERENCES

What are the implications of differences between enforcers in the interpretation and application of policy? Antitrust is by no means the only field in which businesses can be caught between different enforcers. As you may know, I have spent many years in academia. During that time, I authored a study with Howard Beales (now the FTC's Director of the Bureau of

Consumer Protection) that analyzed the impact of multiple regulators on national advertising.[30] I believe that our findings in that study provide some useful analogies in the multi-jurisdictional merger context.

Both the states and the federal government regulate the content of advertisements. It usually is not economically feasible to adapt national advertising campaigns to the standards of individual jurisdictions. For this reason, every national advertiser that reached a settlement about a particular claim with a state challenger abandoned that claim nationwide. Consequently, enforcement actions brought by individual states created national advertising policy.[31]

One result of this framework is that, when disagreements among regulators arise, the most restrictive jurisdiction will prevail, not the one that most accurately assesses the effects of advertising on consumers. This problem is most obvious when jurisdictions apply different standards to the conduct at issue, but a problem remains even when multiple jurisdictions apply the same standard to the same conduct. In this case, under certain conditions,[32] the most restrictive judgment will govern. As I indicated above, reasonable people can differ in their application of the same law to the same facts. Thus, different judgments will arise even when using the identical legal standard. Without a forum to resolve the inevitable differences of opinion among enforcers, the safest course for a national advertiser may be to restrict its claims to those not likely to be challenged anywhere, thereby reducing the amount of information available to consumers.

This problem can be illustrated by imagining a baseball game with two umpires standing at each base, each of whom unilaterally has the right to call a player "out." Even though the rules of the game are clear, each umpire will call plays as he sees them. For most plays, the existence of additional umpires will not change the outcome. But for close plays, if one of the umpires believes a player is out, scoring will decrease. In such a situation, the most restrictive judgment will prevail, even if other umpires reach the opposite conclusion.

Turning to the merger context, there are apparent similarities. The ruling of the most restrictive jurisdiction with respect to a proposed merger ultimately will prevail. Consequently, disagreements among regulators may lead businesses to restrict their merger activity to transactions that will be acceptable to all jurisdictions. As a result, merger activity may fall to sub-optimal levels, as businesses are dissuaded from negotiating transactions that most

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[30] J. Howard Beales & Timothy J. Muris, STATE AND FEDERAL REGULATION OF NATIONAL ADVERTISING (1993). The states in the last several years have been far less active in regulating national advertising than they were in the period described in our book. Moreover, our analysis reveals that multiple regulators applying different standards on occasion can be preferable to one regulator applying a too-restrictive standard. The results can be quite complex, turning on a variety of factors, as discussed in our book and below.

[31] The point may not hold for relatively small U.S. states.

[32] The conditions include that the decisions are made independently, are based on identical information, and are made without the possibility of a compromise result. As discussed below and in our book, these conditions are more likely to exist with national advertising than with mergers.

[33] As in the advertising context, the costs, including delay, of litigating the lawfulness of a merger in multiple jurisdictions might outweigh the benefits to be obtained by that merger. Thus, if a close-call transaction is pursued, a challenge by the most restrictive jurisdiction might result in the abandonment of a transaction that most jurisdictions concluded did not raise competitive concerns.

[34] The involvement of multiple regulators can also be beneficial, serving as "laboratories" in which different approaches are tried and tested and "compete" with one another for broader acceptance.

[35] In other words, we do not pursue convergence for its own sake, but rather to seek consensus on best practices that each jurisdiction can implement as appropriate.

[36] Advertisements may not be an all-or-nothing proposition, either. Certain disputed claims may be omitted, just like certain divestitures may be made, while still permitting the bulk of the advertisement to be aired.

react similarly to most national advertising campaigns, mergers involving worldwide relevant geographic markets are the exceptions. When we oppose a merger based on U.S. market conditions, as we recently did in the *Diageo/Pernod/Seagram* matter,[37] the likelihood of international controversy is greatly reduced.

Moreover, the fact that mergers are pre-notified is another significant difference from advertising.[38] This structure facilitates international cooperation with respect to appropriate merger remedies without the egg unscrambling problem frequently confronted when undoing consummated mergers.

III. DEALING WITH THE DIFFERENCES

As I mentioned earlier, dealing with the differences is a major purpose and goal of the U.S.-EC antitrust enforcement cooperation agreement. In operation, the Agreement enables

[37] *In the Matter of Diageo PLC and Vivendi Universal S.A.*, FTC File No. 011-0057, FTC press releases dated Oct. 23, 2001, and Dec. 19, 2001, *respectively available at* <http://www.ftc.gov/opa/2001/10/diageo.htm> and <http://www.ftc.gov/opa/2001/12/diageo.htm>.

[38] There can be forms of pre-clearance with advertising, as we discuss in our book, *supra*, n. 29.

EC and FTC reached compatible decisions, announced on the same day.[39]

Novartis/AstraZeneca[40]

Another example included the merger of Novartis and AstraZeneca, two leading producers of agricultural chemicals. The EC and the FTC agreed that the proposed transaction would lead to anticompetitive effects both in the United States and Europe. Although the parties agreed to divestitures designed to cure the anticompetitive effects, the challenge was to find a buyer who could effectively manage those assets competitively on both continents. With a lot of good will and hard work on both sides of the Atlantic, our agencies came to agreement on an appropriate divestee.

Air Liquide/Air Products/BOC

The *Air Liquide/Air Products/BOC* case is a good illustration of a case with different effects in different geographic markets. I mention it to emphasize that point because some have cited the case – mistakenly, I believe – as a counterpoint to t47 T3gPoseg6 h -0.0dl t4s /Fhrentuse some o7/Ho

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[39] *In the matter of the Boeing Company*, FTC Press Release (Sept. 27, 2000), FTC Complaint, Consent Agreement, Decision and Order, and Analysis to Aid Public Comment, *available at* <http://www.ftc.gov/opa/2000/09/boeing.htm>; *Boeing/Hughes*, Case No IV/M.1879, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1879_en.pdf>.

[40] *In the Matter of Novartis AG; AstraZeneca, PLC; and Syngenta AG*; *see* FTC Press Release (Nov. 1, 2000), FTC's Complaint, Consent Agreement, Order, and Analysis to Aid Public Comment, *available at* <http://www.ftc.gov/opa/2000/11/astrazeneca.htm>; *AstraZeneca/Novartis*, Case No COMP/M.1806, European Commission Decision, avail*able at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1806_en.pdf>.

[41] *See* European Commission Press Release IP/00/46, *Commission approves the acquisition of parts of BOC (UK) by Air Liquide (France) subject to conditions* (18 Jan. 2000); *Air Liquide/BOC*, Case No COMP/M.1630, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m1630_en.pdf>.

The EC's press release announcing the decision states:

> The FTC . . . and the Commission have remained in close and mutually beneficial contact all along the procedure by sharing information, and by discussing and developing consistent analysis of the main substantive issues.[42]

B. Policy Review – The Mergers Working Group

Going beyond cooperation in individual cases, U.S. and EC authorities have committed with renewed vigor to reviewing policies and to seeking convergence of our enforcement approaches. Since our formal consultations in September, EC and U.S. officials have drawn up plans to examine several issues of substance and process with the goal of further narrowing differences. We have established good precedent for this in our recent examination of our respective approaches to remedies in merger cases, after which the EC issued a Notice that reflected experiences and best practices in both jurisdictions.[43]

The substantive areas to be reviewed include the application of the theories of portfolio power and conglomerate effects, which can arise in many contexts. As I mentioned, the EC and FTC faced such an issue in the *Boeing/Hughes* case. These theories have arisen in other cases, such as *Guinness/GrandMetropolitan*[44] and *Tetra Laval/Sidel*,[45] recently decided by the EC. These theories are hardly new.

Over the past few months, I and members of the FTC staff have had several opportunities to talk with our EC counterparts, Commissioner Monti and members of his team. While each side may feel confident that it holds the "correct" view on these issues, all are willing to discuss the issues in detail, which should lead, at a minimum, to a deeper understanding of each side's theoretical foundations and factual predicates. How far we can narrow the differences remains to be seen.

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[42] *See* European Commission Press Release IP/01/1436, *Commission prohibits CVC's acquisition of Austrian fibre company Lenzing* (17 Oct. 2001), *available at* <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1436|0|RAPID&lg=EN>; *CVC/Lenzing*, Case No COMP/M.2187, European Commission Decision, *available at* <http://europa.eu.int/comm/competition/mergers/cases/decisions/m2187_en.pdf >.

[43] Commission Notice on remedies acceptable under Council Regulation (EEC) No 4064/89 and under Commission Regulation (EC) No 447/98, *available at* <http://europa.eu.int/comm/competition/oj_extracts/2001_c_068_03_02_0003_0011_en.pdf>.

[44] *Guinness/GrandMetropolitan*, Case No IV/M.938, European Commission Decision 98/602, *reported at* [1998] CEC 2502; *Guinness PLC, et al.*, FTC Dkt. No. C-3801, Decision and Order, Apr. 17, 1998, *reported in* 5 Trade Reg. Rpt. (CCH) ¶ 24,359.

[45] *Tetra Laval/Sidel, supra*, n. 18. *See* European Commission Press Release IP/01/1516, *Commission prohibits acquisition of Sidel by Tetra Laval Group* (30 Oct. 2001), *available at* <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1516|0|RAPID&lg=EN>.

C. International Competition Network

The problem of multiple decision makers could increase exponentially when global transactions are subject to review in many of the approximately sixty jurisdictions with merger control laws. I am therefore encouraged that the bilateral U.S.-EC policy deliberations will be emulated in a new multilateral network of competition authorities, the International Competition Network (ICN). The ICN was "launched" on October 25 by competition officials from many countries at the Fordham Corporate Law Institute in New York City.[46]

Building on the Global Competition Initiative recommended by the International Competition Policy Advisory Committee[47] (ICPAC), co-chaired by Jim Rill and Paula Stern, the International Competition Network will provide a venue where senior antitrust officials from developed and developing countries will work to reach consensus on concrete proposals for procedural and substantive convergence in antitrust enforcement. We hope to make international antitrust enforcement more efficient and effective, to the benefit of consumers and companies around the world. The ICN also will assist developing countries in building a competition culture based on sound economic principles. One of the ICN's first topics is merger review in a multi-jurisdictional context, and includes projects focusing on merger notification and procedures, the framework for analyzing mergers, and merger investigation techniques.

Input from the private sector, through advisors to the ICN, will be critical to the ICN's success. The advisors can provide insight regarding the selection and analysis of topics as well as practical experience and analytical skills from various disciplines – business, professional, academic, and consumer interest. This input also should promote greater transparency and likely greater acceptance of the ICN's work product.

IV. CONCLUSION

Although the outcome of EC/U.S. policy reviews cannot be predicted at this point, it is clear that both sides remain committed to one of the chief goals of our cooperation agreement – "to lessen the possibility or impact of the differences between us in the application of our competition laws." We and the EC are continuing our close cooperation on cases, we are seeking further convergence through our working group, and we are committed to the success of the International Competition Network. The experience of the last ten years and the analysis I have described shows that *GE/Honeywell*-type outcomes should be the exception, not the norm.

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[46] *See* FTC Press Release, *U.S. and Foreign Antitrust Officials Launch International Competition Network* (Oct. 25, 2001), *available at* <http://www.ftc.gov/opa/2001/10/icn.htm>; International Competition Network, *Antitrust Authorities Launch the "International Competition Network"* (Oct. 25, 2001), *available at* <http://strategis.ic.gc.ca/pics/ct/nr_e.pdf>. The ICN website is found at: <http://www.internationalcompetitionnetwork.org>.

[47] U.S. Dep't of Justice, Antitrust Div., International Competition Policy Advisory Comm. to the Att'y General and Assistant Att'y General for Antitrust, *Final Report* (2000), *available at* <http://www.usDOJ.gov/atr/icpac/finalreport.htm>.